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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-31

HONOLULU RAPID TRANSIT COMPANY, LIMITED,
Petitioner,

VS.

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII, and THE CITY AND COUNTY OF HONOLULU,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT CITY AND COUNTY OF HONOLULU IN OPPOSITION

The respondent City and County of Honolulu (City) respectfully prays that the Petition of the Honolulu Rapid Transit Company, Limited (HRT) for a writ of certiorari be denied.

QUESTION PRESENTED

Whether the purchase of a privately-owned, public utility property, pursuant to the terms of a contract between the government and the utility at a price which is lower than that ordinarily obtainable under eminent domain, is a taking of private property without the payment of just compensation.

STATEMENT OF THE CASE

The City generally agrees with HRT's summary of the historical background of the case. However, HRT neglects to mention that Act 186, S.L.H. 1921 ". . . was the subject of extended hearings, at which hearings representatives of the municipality, the company, and the public attended . . ." (R. 243 and 246).

Moreover, the record also shows that the bill as passed "met with the approval of the Honolulu Rapid Transit and Land Company, Public Utilities Commission, City and County of Honolulu, and was the result of compromise had between all parties in interest after innumerable meetings and hearings; . . ." (R. 244; 48-58).

Consequently there is no support in the record for HRT's assertion on page 4 of its Brief that a provision authorizing the acquisition of HRT's property without the payment of just compensation was added by the Hawaii Senate Judiciary Committee, by which HRT apparently means that no such provision was considered earlier. Therefore, the City has attached as Appendices A and B to this Brief the report of

the Senate Judiciary Committee Eleventh Legislature, Regular Session 1921 (pp. 336-337, Senate Journal 1921) and Senate Bill 30 in the form approved by the Public Utilities Commission introduced during that session and later to become Act 186. Senate Bill 30 provides in Section 24 of the proposed franchise that the City could ". . . acquire the property of the Company by paying to it cash equal to the par value of its outstanding capital stock . . ." (Appx. p. viii) in HRT's reply brief before the Supreme Court of the State of Hawaii in its appeal from the decision of the Public Utilities Commission on the valuation of the physical and tangible property of the Company pursuant to Section 20, HRT attached the decision of the Public Utilities Commission dated September 19, 1924 as an exhibit. That decision is set forth in part in Appendix C of this Brief. According to that decision HRT filed a petition for an increase in the rates of the fare wherein it stated,

> "3. That the fair value of the property of the company actually used for public utility purposes is not less than the sum of three million dollars ($3,000,000), and the par value of its authorized, issued and outstanding capital stock is the sum of two million five hundred thousand dollars ($2,500,000)." (Appx. p. xiii).

These public records clearly show that the early drafts of the franchise, which had the full support of HRT, provided for the purchase of the HRT property at a price which was less than that to which it would be entitled to under eminent domain. The Senate Judiciary Committee, then, did nothing more

than change the formula by which the value of the property to be purchased by the City would be determined. Under either method of valuation elements such as appreciation in value of the real estate, which is what HRT is principally concerned with here, or going concern value would not have been allowed.

The City considers this point worth mentioning because, as the record plainly shows, HRT has throughout the proceedings in the lower courts attempted to characterize the franchise as a taking of its property. The City and the courts below on the other hand have relied on the principal that the franchise is nothing more than a contract which HRT not only willingly entered into but had a hand in drafting. In view of the authorities discussed later in this brief, HRT's willing acceptance of the franchise is enough by itself to form a valid contract whose terms are binding on the Petitioner. But the very fact that HRT participated in the drafting of the franchise certainly precludes any possibility that the Company was forced to waive a constitutional right.

ARGUMENT

I

THE DECISIONS BELOW WERE CLEARLY CORRECT

a. The decisions below were in complete accord with the decisions of this Court

In rejecting HRT's claim the Courts below relied upon the well established principle set forth in numerous decisions of this Court that a franchise is a

contract between the grantor and the grantee. The trustees of *Dartmouth College v. Woodward,* 4 Wheat. U.S. 518, 656 (1819); *Grand Trunk Western Railroad Company v. South Bend,* 227 U.S. 544, 552 (1913); *Stone v. Mississippi,* 101 U.S. 814, 816 (1880). The consideration for the grant of a franchise has been held to be the obligation of the grantee to be bound by the terms and conditions thereof, *Central Transportation Company v. Pullman Palace Can Co.,* 139 U.S. 24, 43 (1891), or as expressed by some authorities, it may be the benefit to the community. *Dartmouth College v. Woodward, supra,* at 637. As in other contracts, a franchise may contain such terms and conditions as the grantor deems fit which when accepted by the grantee become part of the contract, *Southern Pacific Co. v. Portland,* 227 U.S. 559, 572 (1913); *New Orleans Water Works Co. v. Rivers,* 115 U.S. 674, 680-681 (1885), and it makes no difference that the grantor is powerless to impose the obligations of the franchise under its general legislative powers, *Southern Pacific Co. v. Portland, supra,* at 571, 572. It is basic to the law of contracts that for a contract to be valid and enforceable it must be supported by a consideration. *Tilley v. City of Chicago and County of Cook,* 103 U.S. 155, 161 (1881); Williston, *Contracts* (3rd Ed. 1957) Sec. 107. Consideration is said to be the "price" bargained and paid for a promise. Consideration is present if there is a forbearance to assert a legal right, *Graphic Arts Fashion Inc. v. Boston Redevelopment Authority,* 255 N.E.2d 793, 795 (1970) or the relinquishment of a property right;

Hetrick v. Ashburn, 86 Ind.App. 496, 142 N.E. 386, 387 (1924). In exchange for the franchise grant HRT bargained away its right to the compensation it would have been entitled to under the Fifth and Fourteenth Amendments to the U.S. Constitution. HRT has cited no authority that such a bargain is for any reason invalid or against public policy. Indeed there is no such authority for there is no doubt that constitutional rights for the benefit or protection of an individual may be waived, *Johnson v. Zerbst,* 304 U.S. 458, 464, 465 (1938).

It is also fundamental to the law of contracts that there must be an acceptance of the offer. *Tilley v. City of Chicago and County of Cook, supra,* at 161; *C. Iber and Sons, Inc. v. Hermit,* 108 Ill.App.2d 443, 248 N.E.2d 131, 133-134 (1969); Williston, *Contracts* (3rd Ed. 1957) Sec. 64. The franchise specifically provides in Section 22 that it would not become effective until *accepted* by HRT. Thus the franchise presented to HRT was an offer which the Company could either accept or reject. Upon the recommendation of its directors (R. 57) the offer was accepted (R. 43). The purchase provisions of Section 20 of the franchise then, are merely part of the price HRT was willing to pay in 1921 for the valuable franchise grant, a grant which has enabled the Company to prosper, and in the words of its counsel ". . . become a dynamic operating and investment company". (R. 46) In having accepted the franchise HRT has taken advantage of a privilege enjoyed by no other citizen. In exchange for this privilege HRT, presumably with a due

regard for its own best interests, bargained away its right to just compensation in the eminent domain sense by giving the City an option to purchase its property at less than fair market value. The Territory acquired for the City the right to purchase the property of HRT, in the event that should become necessary, at a price which would not reflect any increase in the value of the property of the Company by reason of its protected petition under the franchise but would nevertheless permit the shareholders to recover their investment in the event the property declined in value.

b. Reliance on the decision in Frost & Frost Trucking Co. v. Railroad Commission, 271 U.S. 583 (1926) is misplaced.

HRT in arguing that Section 20 of the franchise is unconstitutional because it deprives HRT of its property without the payment of just compensation in the eminent domain sense overlooks the well settled legal principle that its franchise is a contract, and instead places heavy reliance on the doctrine of unconstitutional conditions set forth in the case of *Frost & Frost Trucking Co. v. Railroad Commission, supra,* at 593, 594. HRT is seeking to repudiate its part of the contract by now arguing that it was forced to waive its constitutional right to just compensation. In its petition for certiorari to this Court, HRT contends that its franchise was in reality nothing more than an act of the Legislature which deprived the Company of its property without just compensation as the price for staying in business, or in effect that HRT was given a choice between the "rock and the whirlpool".

HRT points to the record generally to support this argument (Pet. 11).

The *Frost* case, of course, does not hold that the waiver of a constitutional right is *per se* invalid. Instead it holds that a State may not in the absence of the proper exercise of its regulatory power *compel* the waiver of a constitutional right in exchange for the grant of a privilege. Accordingly, the applicability of *Frost* to this case depends on the element of coercion to compel the waiver of the constitutional right. There is, however, nothing in the record which provides even the slightest support for HRT's claims of "coercion". In fact it should be noted that HRT's complaint filed in the District Court does not even make the allegation that it was forced to accept the so-called "unconstitutional condition" in exchange for the franchise (R. 2-14), and in view of HRT's own exhibit the report of the directors to the shareholders (R. 48-58), set forth in Appendix D such an allegation would be difficult if not impossible to sustain.

This report, recommending acceptance of the franchise, provides no indication that the HRT directors were dissatisfied with the provisions of Section 20 or that they were recommending acceptance of otherwise unacceptable terms simply because there was no other choice if HRT wanted to stay in business, the so-called choice between the "rock and the whirlpool". It is true, of course, as HRT points out (Pet. 8) that its directors were faced with alternatives to accepting the franchise, which as prudent businessmen they had to consider. However, the alternatives were in no way

similar to the choices confronting Frost & Frost Trucking Company. HRT could continue to operate under its existing franchise for another 7½ or 8½ years. During this period the directors calculated that the stockholders would continue to receive an annual dividend of 8 per cent on their investment and at the termination of the franchise there would be sufficient resources to pay off all the debts of the Company and redeem the stock at par value with a possible surplus of 20 to 30 per cent. Its second alternative would have been to reject the new franchise and during the remaining 7½ to 8½ years on its existing franchise petition the Legislature for a more satisfactory franchise. According to the directors' report the only objection of the directors to the new franchise was that Congress had amended it to delete the provision requiring the approval of Congress in the event of its termination by the Territorial Legislature (R. 54-55). No objection, however, was made to Section 20. The third alternative, acceptance of the franchise, was chosen (R. 43).

Nevertheless, HRT points to the fact the franchise is in the form of an Act of the Legislature which it claims was presented to HRT on a "take it or leave it basis". (Pet. 11) With respect to HRT's first point, it is, of course, undeniable that the franchise is in the form of an act of the Legislature but Respondent City contends that this particular factor has no relevance to HRT's belated claim of coercion.

A franchise is a grant of a privilege conferred by a government on an individual which does not belong to

everyone as a matter of right. *New Orleans Gas Light Co. v. Louisiana Light and Heat Producing and Manufacturing Co.*, 115 U.S. 650, 659 (1885). The franchise must, therefore, emanate from the sovereign power of the government, *Grand Trunk Western Railroad Company v. South Bend, supra,* at 554, 555; *New Orleans Gas Light Co. v. Louisiana Light and Heat Producing and Manufacturing Co., supra,* at 659; *Territory v. Fung,* 34 H. 53 (1936), and it is an exercise of legislative power, *Blair v. Chicago,* 201 U.S. 400, 457 (1906); *Walla Walla v. Walla Walla Water Company,* 172 U.S. 1, 9 (1898); *Morita v. Public Utilities Commission of the Territory of Hawaii,* 40 H. 579, 583 (1954); *Gulick v. Flowerdew,* 6 H. 414, 432 (1883). Consequently, the franchise conferred upon HRT had to be an act of the Legislature and this fact alone does not make it any the less a contract.

HRT's second point, that it was presented with the franchise on a "take it or leave it basis" (Pet. 11), by which it apparently means that it had no part in drafting the franchise, is simply not supported by the record. On the contrary, the reports of the Committees on Territories of the House and Senate of the United States Congress (R. 243-247) indicate that the proposed franchise "was the subject of extended hearings, at which hearings representative of the municipality, *the company* and the public attended, was fully discussed with in public press, and with some amendments passed by the local Legislature" (R. 243 and 246).

Finally as the City has pointed out, the report of the directors provides no evidence of dissatisfaction on the part of the Company with the terms of Section 20. This omission is significant in view of HRT's claim that it was "coerced" into accepting the franchise. If HRT was in fact being coerced, it is reasonable to assume first, that the directors would be aware of it and, second, that this fact would have rated some mention in the report of the directors. Instead the report of the directors clearly shows that the franchise as adopted by the Territorial Legislature had the complete approval of HRT. In short, HRT's claim of coercion is not only without any support in the record, but the record affirmatively supports the City's position that HRT sought, bargained for and willingly accepted the franchise. The principle enunciated in *Frost & Frost Trucking Co. v. Railroad Commission, supra,* therefore, is wholly inapposite.

An additional point which undermines HRT's coercion argument is that HRT was the only transit company operating in the City and County of Honolulu in 1921 (R. 243, 246). It provided an essential public service which was as beneficial to the public as its continuation under a new franchise would be to HRT. Unlike the situation in *Frost & Frost Trucking Co.,* where one trucking company more or less would hardly concern the State of California and, therefore, give the State all of the bargaining power, HRT had a strong bargaining position of its own from which it could more than adequately protect its interests. If HRT was not offered a new franchise on terms it

felt it could accept, it could have, because of its powerful bargaining position, held out during the remainder of its existing franchise for better terms. By the end of its existing franchise, public pressure to insure the continuation and improvement of the mass transit service would certainly have persuaded the Territorial Legislature to consider a franchise for the Company with more favorable terms. HRT clearly realized this fact for in its directors' report to shareholders it says, "If the franchise in the form passed by Congress had been presented when the Legislature was considering the new franchise, the Company would have refused to approve it and the new franchise *would not have been passed* by the Legislature" (Appx. p. xxvi) (Emphasis added). This is tantamount to saying that HRT had a veto power over legislation it considered to be against its interests. How then can HRT now claim that it was coerced into accepting a franchise which it disliked? It is safe to assume that if HRT found Section 20 to be unacceptable the franchise would not have been passed by the Legislature. Also in this connection we refer to the report of the Public Utilities Commission to the Eleventh Legislature, Regular Session 1921 (pp. 64-69, Senate Journal 1921) set forth in Appendix E. The Public Utilities Commission reported that in considering proposals for a new franchise it did not consider Senate Bill 194 introduced at the 1919 legislative session because the Company specifically withdrew its support of that Bill (Appx. p. xxxiv). When this historical background of Act 286 is considered, it seems frivolous indeed for

HRT to claim at this late date that it was "coerced" into accepting the franchise.

c. The conditions of the franchise are appropriate to the grant by the territory of a special privilege to a private individual.

Assuming for the sake of argument that the franchise was a completely unilateral act of the Legislature which HRT had no part in drafting and could only accept or reject, the law is well settled that conditions imposed in the grant of a privilege are not *per se* invalid. *Frost* does not invalidate every obligation which the government may impose on an individual as a condition for the grant of a privilege. As the City argued before the Court of Appeals for the Ninth Circuit, the tendency of the decisions subsequent to *Frost* has been to separate the power to grant or withhold a privilege from the condition itself evaluating the later as it would any other exercise of the State's regulatory power,[1] and conditions that impose valid regulations have been upheld.

Stephenson v. Binford, 287 U.S. 251, 275-276 (1932);

Washington ex rel. Bond & G. & T. v. Superior Court, 289 U.S. 361, 364-365 (1933);

Nebbia v. N.Y., 291 U.S. 502, 537 (1934);

Watson v. Employees Liability Assurance Corp., 348 U.S. 66, 71-73 (1954);

Parden v. Terminal Railroad, 377 U.S. 184, 193 (1964).

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[1]73 *Harvard Law Review,* 1595-1607, Unconstitutional Conditions.

The same principle is applicable to conditions in government grants. This Court has not invalidated conditions in permits that are appropriate to the protection of the public interest, *U.S. v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940). In franchises the conditions, or consideration flowing to the government, must likewise be evaluated from the point of view of the objectives of the grant. The objectives of the HRT franchise was to insure the continuation of public transportation in the City of Honolulu. But at the same time there was a need to include conditions for the protection of the public interest from possible abuse of the grant by the grantee. Therefore, the appropriateness of the purchase provisions as part of the franchise must be considered within the context of the grant itself and the public interest to be protected.

It has been held that "a franchise is a special privilege conferred by the state on an individual, which does not belong to the individual as a matter of right", *Madden v. Queens County Jockey Club*, 296 N.Y. 249, 72 N.E.2d 697, 699 (cert. denied 332 U.S. 761) (1947). Consequently, for the protection of the public, courts have long sustained the practice of including in the grant a retained power to alter, amend or repeal the franchise, *Greenwood v. Union Freight R.R. Co.*, 105 U.S. 13, 20, 21 (1881); *Louisville Bridge Co. v. U.S.*, 242 U.S. 409, 418 (1917), and this does not affect its contractual nature. Another consideration unique to franchises is the principle that they are construed most strongly against the grantee. *Louisville Bridge*

Co., supra; Broad River Power Co. v. South Carolina, 281 U.S. 537, 543 (1930).

Transportation utilities in 1921 were approaching the peak of their prosperity. They were profitable as well as public necessities. The franchise grant, therefore, conferred a substantial ecnomic benefit on HRT. However, the Territory could foresee the possibility of the need arising at some future date for the City to take over the operation of the mass transit system in order to assure the continuation of this essential public service. In anticipation of that event, the Territorial Legislature deemed it prudent to include in the franchise a provision which would limit the purchase price to the investment in the business less depreciation due to the use of the equipment but excluding such elements as the appreciation in value of HRT's real estate and intangibles. The Territorial Legislature perhaps felt that it would not be in the public interest to permit HRT to enjoy all the economic benefits of a legislatively granted monopoly on public transportation in the City and County of Honolulu for as long as such service remained profitable, but when HRT's franchise became less profitable thereby forcing the City to assume the operation at public expense, to require the City to pay for such elements as the appreciation in the value of HRT's real estate or its intangibles. Because of the franchise grant HRT's investment in its plant was safe from the ordinary perils of business, the most important being competition. Therefore, in a sense the franchise gave HRT's stockholders a measure of security which

ordinary businessmen did not have. What is unreasonable about the reservation in the franchise of a condition that would enable the City to share some of the benefits which have accrued to HRT from the grant in the first place? This "price" which HRT agreed to pay for the grant is therefore clearly appropriate to the economic bargain between the Territory and the Company.

HRT is in no worse position than the respondents in *United States v. Appalachian Electric Power Co., supra,* and the appellants in *Fox River Paper Co. v. Railroad Commission,* 274 U.S. 651 (1927). In both cases this court upheld permit conditions which gave the government the right to purchase the property of the permittee constructed under the permit at a price which was less than its fair market value against the claim that such conditions were a taking of private property without the payment of just compensation. The decision of the Ninth Circuit is, therefore, in complete accord with the applicable decisions of this court with respect to the imposition of conditions for the protection of the public interest in grants of a privilege to private individuals.

II

THERE IS NO CONFLICT OF DECISION

Petitioner cites two cases in support of its claim that there is a conflict between the circuits, which this Court should resolve: *United Gas Pipeline v. Terrebonne Parish Police Jury,* 445 F.2d 301 (1971 5th Cir.) aff'g 319 F.Supp. 1138 (E.D.La. 1970) and

Midwest Video Corp. v. United States, 441 F.2d 1322 (8th Cir. 1971), rev'd 40 U.S.L.W. 4626 (June 7, 1972). There is, however, simply no conflict between either decision and the decision of the Ninth Circuit in *HRT, et al. v. Dolim, et al.,* ..... F.2d ..... (1972). *United Gas Pipeline, supra,* bears only the most superficial resemblance to the case presented by Petitioner. HRT is assailing a condition attached to the issuance of a building permit to construct a pipeline under a parish road. This condition was that United agree to comply with Ordinance No. 1682 adopted on April 8, 1970 by the police jury and "upon United also agreeing that if that proposed pipeline or any portion thereof interferes with any future public improvement in said parish, it, United, will alter, relocate or remove, at United's sole expense, the pipeline on that portion of the land covered and affected by the aforesaid right of way and servitude which United purchased from the South Code Corporation which is not under the road", 319 F. Supp. 1143. United also challenged Ordinance No. 1682 which purported to regulate the construction and maintenance of gas pipelines serving interstate commerce. The decision of the District Court and the Court of Appeals for the Fifth Circuit was that both the condition and the ordinance were invalid. The condition was invalid because it constituted a taking of United's property without the payment of just compensation and the ordinance was invalid because the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. 1671 et seq.) preempted state and local regulations of gas pipelines serving interstate commerce.

The decisions of both the District Court and Court of Appeals in *United* invalidating the condition is correct when the analysis of conditions attached to government grants referred to earlier in this brief is applied to the facts. If the condition requiring United to relocate its pipeline outside of the public right of way is considered apart from the privilege to be granted by the parish, in this case a building permit to construct a pipeline under a public road, it is clear that the condition would be invalid as an exercise of the State's regulatory power. The parish simply has no power to legislate the taking of United's property without the payment of just compensation. It is likewise not possible to justify the condition on the basis that it protects any legitimate public interest which is integrally connected with the granting of the building permit. The public interest in United's building permit cannot be expected to extend to the regulation of United's pipeline beyond the public right of way. In other words if Terrebonne Parish allows United to construct its pipeline across the public road, it should be entitled to impose reasonable regulations or conditions for the protection of the public interest which may include the relocation of United's pipeline within the public right of way in the event the pipeline should interfere with public improvements constructed in the right of way. The Court of Appeals for the Fifth Circuit recognized the propriety of such conditions when it said:

> "we do not hold that the Parish Police Jury cannot enact a valid ordinance requiring permits with reasonable conditions", 445 S. 2d at 302.

But the relocation of United's pipelines outside the public right of way bears no relevance to the protection of the social interests endangered by granting the building permit.

On the other hand, as the City has already argued in this brief, the purchase provisions in Section 20 which were agreed to by HRT, when considered in the context of the franchise grant, do protect a legitimate public interest. Furthermore, unlike the situation in *United Gas Pipeline Co. v. Terrebonne Parish Police Jury, supra,* it cannot be said that the franchise was in any way conditioned on the acceptance of the terms of Section 20 because as the record clearly shows HRT had considerable influence in drafting its franchise, and according to its directors could have prevented the passage of any franchise with the terms it found to be unacceptable.

The case of *Midwest Video Corp. v. United States, supra,* appears to provide even less support for Petitioner's asserted conflict between the circuits than *United Gas Pipeline, supra.* It is difficult to see any similarity between the issue before the court in *Midwest Video Corp.* and the issue before the Ninth Circuit in *HRT, et al v. Dolim, et al, supra,* from which a conflict between the Eighth and Ninth Circuits could have arisen. If anything, the decision of the Eighth Circuit was in conflict with the applicable decisions of this Court as can be seen from this Court's reversal of the Eighth Circuit decision in *U.S. v. Midwest Video Corporation,* 40 U.S.L.W. 4626 (1972). In fact that decision provides further

support for the proposition referred to earlier in this Brief that the government can require as a condition for the granting of a permit, compliance with certain provisions which benefit the public particularly when those provisions are an integral part of the permit. *Fox River Paper Co. v. Railroad Commission, supra; United States v .Appalachian Electric Power Co., supra.*

In *Midwest Video Corp., supra,* the only real issue before the court concerned the statutory authority of the Federal Communications Commission, under the Communications Act of 1934, as amended, (47 U.S.C. Sec. 151 et seq.) to require CATV operators with 3500 or more subscribers to "cablecast". The "conflict" between the Eighth and Ninth Circuits then is that the Eighth Circuit applied *Frost* to the case before it to invalidate the commission cablecasting requirement (held by this court to be within the statutory authority of the Commission to promulgate) whereas the Ninth Circuit held that *Frost* is inapplicable to this case. Significantly no reference was made to *Frost* in any of the opinions filed by this court in *U.S. v. Midwest Video, supra.*

CONCLUSION

Petitioner has failed to present to this Court any persuasive reasons for the granting of certiorari to the Court of Appeals for the Ninth Circuit.

The law has long been well settled that franchises such as the one HRT is presently assailing are con-

tracts. HRT is simply asking this Court to apply constitutional grounds to relieve it from a bargain which the record clearly shows it willingly entered into, not as a result of coercion, but from a bargaining position of some considerable strength. HRT's authorities invalidating the coerced waiver of constitutional rights as a condition for the grant of the privileged by the government are therefore inapposite. In accepting the terms of the franchise in 1921 HRT made a knowledgeable and voluntary waiver of its right to just compensation. Such a waiver of a constitutional right is clearly binding on the party making it particularly when the party has received all the benefits which can accrue therefrom.

HRT is correct in one respect, however, in that if it should prevail on its theory of unconstitutional conditions it will, as the Ninth Circuit Court of Appeals pointed out:

> ". . . gravely prejudice if not destroy the power of the government to utilize options to acquire property, through making it impossible for the seller to commit himself to a sale price. Hindsight would always be available to compel price adjustments on the theory that the price no longer constituted just compensation." *HRT, et al. v. Dolim, et al., supra.*

This would indeed have a substantial but adverse impact on transactions between the government and its citizens. HRT entered into a contract with the Territory in 1921, the terms of which were acceptable then but which HRT now finds not to its liking.

Plainly stated HRT seems to be saying that one who contracts with the government and later finds his obligations under the contract to be unacceptable, has the right to rescind the contract on constitutional ground that it was coerced into the contract in the first place even after accepting all of the benefits thereunder. The coercion in this case is apparently provided by the clarity of HRT's hindsight, viz HRT would not accept a similar franchise today.

For the foregoing reasons and authorities the City respectfully submits that the Petition for a Writ of Certiorari to review the judgment and opinion of the Ninth Circuit Court of Appeals should be denied.

Dated, Honolulu, Hawaii,
August 10, 1972.

Respectfully submitted,
PAUL DEVENS,
Corporation Counsel,
ROBERT M. EHRHORN, JR.,
Deputy Corporation Counsel,
Attorneys for Respondent City and County of Honolulu.

(Appendices Follow)

Appendix A

Honolulu, Oahu, T.H., March 28, 1921.

Honorable Charles F. Chillingworth,
President of the Senate.

Sir: Your Committee on Judiciary, to which was referred Senate Bill No. 30, known as the Rapid Transit Bill, begs leave to report, as follows:

This Bill was prepared by the Public Utilities Commission in compliance with Senate Concurrent Resolution No. 23 of the Special Session of 1919 requesting said commission to report on the question of terms that should be incorporated in any franchise that should hereafter be granted. The said resolution was adopted following the introduction of a franchise bill prepared by and presented in behalf of the Honolulu Rapid Transit and Land Company, the owner of the present and existing franchise, because of the fact that the said franchise bill then presented was introduced too late in the said session to allow for the full consideration that the importance of the measure demanded.

This bill was introduced by this committee in the form originally drafted by the Utility Commission, deferring our consideration of the terms thereof until after presentation and formal committal of same to us, so that hearings and consideration could be had thereon in more regular and due course.

We have held full hearings upon this bill extending over several days, at which were represented the Honolulu Rapid Transit and Land Co., the Board of

Supervisors of the City and County of Honolulu and the Utilities Commission. The said Company and Board each presented numerous objections and amendments, all of which were carefully considered and weighed, and after considerable discussion and deliberation extending over several additional days, we have concluded to recommend the passage of this bill with several amendments, said amendments being such as to have the said bill read as appended hereto and submitted herewith.

In deference to and in consideration of the care, able and painstaking efforts, and conscientious work of the Utilities Commission, as is evident by its report to the Senate pursuant to said resolution 23, we have sought so far as possible to sustain for recommendation the provisions of the bill as originally drafted, and we have departed therefrom in our recommendation only after very careful consideration we were convinced that the demands of fairness to the fare-paying public and the City and County as well as to the Company so required. However, the general theory and fundamental plan underlying and embodied in the original bill are not changed by the proposed redraft herewith presented, and our amendments go mainly to the details of administration and application.

The present franchise of the Honolulu Rapid Transit and Land Company expires in 1928. We believe that the best interests of the public require the granting of a new franchise to this company, and that such franchise be given as soon as possible. By so doing

Honolulu will not only be insured a continuity of the street car service, but will be guaranteed an immediate improvement upon the present system. We understand that as a result of the growth of the District of Honolulu, public convenience demands various extensions, betterments and improvements of its street car system, which would involve the expenditure of very large sums of money. With a tenure of but seven years, it cannot fairly be expected that the present owner of the franchise should make these large expenditures. By the passage of this Bill, however, the company would not only be in a position to effect these improvements on a basis of sound business investment, but could be compelled to do so as the convenience of the public and necessity of better service demand.

In considering the terms to be incorporated in the franchise this bill grants, our paramount and primary consideration has been that which proper regard for the rights of the fare-paying and general public demands, consistently with such proper considerations for the rights and investment of the company as will co-ordinate its interests to the needs, convenience and service rights of the public. We believe that the franchise granted by this bill is sufficiently liberal to the company to enable it by proper management to net it a fair return on its investment and encourage it to expend and improve its system to meet the demands and needs of the public, while sufficiently provided with such terms of public control as will prevent placing the public of the City and County at any disadvantage.

We therefore recommend the passage of this bill as amended in accordance with the re-draft of the bill hereto appended and herewith submitted.

Respectfully submitted,

J. W. Russell, Chairman.
L. M. Judd,
E. A. K. Akina,
A. F. Tavares,
William M. Ahia.

Appendix B

(Letterhead of
STATE OF HAWAII
Department of Accounting and General Services
Public Archives
Honolulu, Hawaii)

I, Agnes C. Conrad, Archivist of the Public Archives, of the State of Hawaii, do hereby certify that the attached document is a true and exact photographic copy of the preamble and Section 24, being a portion of Senate Bill No. 30, taken from the files of the 1921 Regular Session of the Legislature, Territory of Hawaii, on file in the Public Archives, at Honolulu, State of Hawaii.

Witness my hand and seal this 26th day of July, A.D., 1972, at Honolulu, State of Hawaii.

/s/ Agnes C. Conrad

Agnes C. Conrad, Archivist

Senate Bill No. 30
THE LEGISLATURE
of the
TERRITORY OF HAWAII

AN ACT

To amend an act entitled "An Act To Authorize and Provide for the Construction, Maintenance and Operation of a Street Railway or Railways in the District of Honolulu, Island of Oahu", enacted by the Legislature of the Republic of Hawaii, July Seventh, One Thousand Eight Hundred Ninety-Eight, and granting a franchise to the Honolulu Rapid Transit and Land Company to operate a Street Railway in the City and County of Honolulu, providing for the operation of the same and providing for the purchase of the same by the City and County of Honolulu.

Whereas, the Legislature of the Republic of Hawaii did, by an Act enacted on the seventh day of July, one thousand eight hundred ninety-eight, authorize Clinton G. Ballentyne and others, their associates and assigns, or such corporation as might be organized by them, to construct, maintain and operate a street railway or railways in the District of Honolulu, Island of Oahu; and

Whereas, pursuant to said Act the said Clinton G. Ballentyne and others did organize a corporation as provided in said Act, under the name of the Honolulu Rapid Transit and Land Company, which, since said date, has been exercising said franchise; and

Whereas, the Act of Congress to provide a government for the Territory of Hawaii, approved April

thirtieth, one thousand nine hundred, provided by the 73rd section thereof that said franchise, with others, should be ratified and confirmed, subject to the approval of the President of the United States; and

Whereas, such approval was given by William McKinley, President of the United States, on June twenty-fifth, one thousand nine hundred, to said franchise as then held by said Honolulu Rapid Transit and Land Company; Now therefore Be it Enacted by the Legislature of the Territory of Hawaii:

That the Act of the Republic of Hawaii enacted July seventh, one thousand eight hundred ninety-eight entitled "An Act to Authorize and Provide for the Construction, Maintenance and Operation of a Street Railway or Railways in the District of Honolulu, Island of Oahu", approved by the President of the United States under the authority of an Act to provide a government for the Territory of Hawaii, approved April thirtieth, one thousand nine hundred, ratifying and confirming said franchise, subject to said approval, is hereby amended to read as follows:

Section 1. Definitions. Wherever in this Act the following words occur they shall be held to have the force and meaning herein set forth unless the context clearly indicates otherwise:

'Railway' shall refer to and mean the rolling stock, busses or other vehicles of transportation whether operated on rails or not, rails, tracks, roadway, with its appurtenances, appliances and connections to be placed in streets, roads or places on the Island of

Oahu, and all land, power stations, houses, buildings, structures and machinery, franchises, and all property of every nature whatsoever owned or acquired, as by this Act provided.

Section 24. Purchase by City and County of Honolulu City and County authorized to purchase and operate.

At any time after authorization therefor by the registered voters of the City and County of Honolulu at an election held in the manner and form and under the terms and conditions as are now or may hereafter be provided for the issuance of bonds by the City and County of Honolulu, the City and County of Honolulu, or its successors, may upon not less than six months' notice in writing to the Company, acquire the property of the Company by paying to it cash equal to the par value of its outstanding capital stock, and assuming the bonded and all other debts and liabilities of the Company at the date of said purchase. And upon the payment of said purchase price and the assumption by the City and County of Honolulu of said obligations the franchise of the Company shall cease and determine and the railway and all other property owned and used in connection therewith by the Company shall become the property of the City and County of Honolulu without further conveyance but said Company shall execute all such further conveyances and give such further assurances as may be necessary to effectuate such purchase.

The City and County of Honolulu, or its successors, is hereby given the right under the conditions aforesaid to purchase, hold and operate the street railway

system or systems so purchased and said City and County and its successors shall have all powers incidental thereto.

The City and County of Honolulu may finance the purchase of the property of said Company by issuing bonds secured by said property and said bonds shall be a first charge on the income therefrom. Said bonds may be issued prior to the time of purchase containing provisions that they will become secured as herein specified as of the date of purchase but prior thereto shall be a lien upon the general revenues of the City and County. Said City and County may, at its option, make said bonds a lien on both the income of the railway and the general revenues of the City and County notwithstanding any limitation as to amount of indebtedness now or hereafter existing and the amount of said bonds shall not be considered to limit the creation of other indebtedness by said City and County as now or hereinafter provided by law. Provided, however, that all revenues derived from time to time from said railway so purchased shall be paid into the treasury of said City and County and there held as a special fund for the following purposes for which alone it shall be expended:

1. The operation and maintenance of said railway.

2. Interest on the bonds issued for such purchase and bonded or other indebtedness of the Company assumed by the City and County of Honolulu at the time of such purchase.

3. A sinking fund for the payment of said bonds and said assumed bonds and said other indebtedness for which purpose there shall be set aside each year

not less than such a sum that the aggregate of the sums so set aside with interest thereon compounded annually at the rate of interest specified in the said bonds and said other indebtedness would amount to the par value of the said bonds and said other indebtedness at maturity nor more than such a sum that the aggregate of such sums with such interest would amount to the par value of the said bonds or said other indebtedness when redeemable.

4. The extension and improvement of said railway.

Section 25. Amendment, Alterations or Repeal.

This act may be amended or altered in whole or in part or repealed by the Legislature of the Territory of Hawaii with the approval of Congress.

Section 26. Effective Date.

This Act shall take effect when the Company shall notify the Governor of the Territory of Hawaii in writing that it has accepted the terms hereof by an affirmative vote of the holders of two-thirds of the issued capital stock, provided such notice is so given within six months after the approval of this Act by Congress, otherwise this Act shall become null and void.

/s/ J. W. Russell,

Chairman, Senate Committee on Judiciary.

Appendix C

Decision No. 21.

Report of Decision
of the
Public Utilities Commission of the
Territory of Hawaii

In the Matter of the Application of the Honolulu Rapid Transit Company, Limited, for an increase in its rates of fare.

Decided September 19, 1924.

Before the Public Utilities Commission
of the Territory of Hawaii

In the Matter of the Application of the Honolulu Rapid Transit Company, Limited, for an increase in its rates of fare.

Before: R. E. Wooley, Chairman.
A. J. Gignoux and Walter Beali,
Commissioners

Appearances:

Messrs. Robertson & Castle (Mr. A. L. Castle)
for Honolulu Rapid Transit Company, Limited.

W. H. Heen, Esq.,
for City and County of Honolulu

Messrs. Smith & Wild (Mr. Arthur G. Smith)
for Public Utilities Commission of the Territory of Hawaii.

DECISION

The Honolulu Rapid Transit Company, Limited, (hereinafter referred to as the Company) on March 26, 1924, filed its petition with this Commission asking for a permanent increase in its present rates of fare, and for the making and fixing of such rules and regulations relating to the sale of tokens or tickets as may be just and reasonable. The Company requests the Commission's approval for rates on its street cars and the Kalihi Bus Service, including free transfers over the entire system, including transfers from bus to street car and street car to bus, as follows:

Full cash fare 7c

Full token or ticket fare, 4 rides for 25c (6 1/4c per ride).

Special rate for children, token or ticket fare, 3 rides for 10c (3 1/3c per ride).

In its petition the Company seeks to substantiate the suggested increase by the allegation that the proceeds derived from the present fares

"are insufficient to meet all reasonable costs of operation including taxes plus a fair return upon the total property of said company actually used for public utility purposes."

In support of this allegation the petition, among other things, states:

"III. That the fair value of the property of the company actually used for public utility purposes is not less than the sum of Three Million Dollars ($3,000,000.00), and the par value of its authorized, issued and outstanding capital stock is the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00).

V. That for the year ending December 31, 1922, the gross revenue of said company was the sum of $989,521.27 and the operating expenses, taxes, depreciation and interest the sum of $793,973.73 on its public utility property, with the then authorized, issued and outstanding capital stock of Two Million Dollars ($2,000,000.00).

VI. That for the year ending December 31, 1923, the gross revenue of said Company was the sum of $988,928.37 and the operating expenses, taxes, depreciation and interest the sum of $832,-512.96 on its public utility property, with the

then authorized, issued and outstanding capital stock of Two Million Five Hundred Thousand Dollars ($2,500,000).

VII. That the estimated gross revenue based on the said rates and charges for the year 1924 is the sum of $1,008,372.20 and the estimated operating expenses, taxes, depreciation and interest on borrowed money under efficient and conservative management is the sum of $933,-924.21, without any provision for any return to the investors whatsoever.

VIII. That during the years 1922 and 1923 the Public Utilities Commission of Hawaii authorized and approved expenditures on capital account in the total amount of $640,004.22, of which said amount the sum of $561,103.07 has been expended, as authorized and specified by said Commission, up to the 29th day of February, 1924, and for which capital stock in the total amount of Five Hundred Thousand Dollars ($500,000) par value was sold at par under authority of said Commission and the proceeds thereof used to pay for the additions, betterments, improvements and extensions as authorized, up to the amount of $500,000, making the total issued and outstanding capital stock, as above set forth, namely, $2,500,000.

X. That your petitioner believes that said rates of fare, or charges, will not be more than 'sufficient to meet all reasonable costs of operation of its said public utility system, including taxes, plus a fair return on the total property of said Company actually used for public utility purposes,' as provided in said Act 186 of the Session Laws of 1921."

[Pages 5–69 of the Decision are omitted here]

The Company through its president has declared its willingness to establish a depreciation sinking fund in accordance with the suggestions of this Commission. Details as to the setting up and regulation of the fund are not a part of this proceeding and may be left for later consideration. We expect the Company to come before this Commission with an appropriate application with a view to putting the suggested plan of depreciation insurance into early effect.

IX. Reports to the Commission.

In order to ascertain to what extent actual conditions will be met by the estimates contained in this decision, we expect the Company to furnish the Commission with monthly statements showing the effects of the changed rates on revenues, expenses and traffic characteristics in a form acceptable to the Commission.

X. Effective Date of Order.

The Commission's order will issue placing in effect the rates heretofore set out in this decision and making said rates effective as of October 1, 1924.

Public Utilities Commission of
The Territory of Hawaii

Ralph E. Wooley,
Chairman.

A. J. Gignoux,
Commissioner.

Walter Beall,
Commissioner.

Dated, Honolulu, T. H.,
September 19, 1924.

Appendix D

Rapid Transit Directors Recommend Acceptance of Franchise

Report of Directors Analyzes Status of Company and Discusses Reasons For and Against Three Alternate Courses Open For Adoption, viz.: (1) Absolute Rejection; (1) Reject and Apply For Amendment; (3) Accept and Attempt Finance Extensions

Directors Recommend Stockholders to Accept Franchise and Try to Finance—If Unsuccessful, Then Apply For Amendment

Report of a Special Committee of Directors of H. R. T. & L. Co. to the Directors.

To the Board of Directors of the Honolulu Rapid Transit and Land Company:

Your Committee to whom was referred the subject of preparing an analysis and statement concerning the pending new franchise recently passed by Congress, more particularly to formulate a statement to stockholders and other possible investors, with a view to ascertaining whether or not stock or bonds for necessary extensions and improvements can be successfully placed under the new form of franchise, beg to say that they have given the matter careful

consideration and come to the conclusion that the time between now and February 24th when the franchise must be accepted or rejected, is too short in which to secure such subscriptions.

Your Committee has therefore prepared for your consideration an analysis of the status of the Company, financial and otherwise, with a statement of the several alternate courses which the Company may pursue in this connection. Such analysis is submitted herewith for your consideration.

Your Committee recommends that the Board give this report its prompt attention and thereupon make such recommendation to the stockholders as it may see fit.

Respectfully submitted,

L. T. Peck,
L. A. Thurston,
H. S. Johnson,
Alfred L. Castle.

Honolulu, February 2, 1922.

What Shall Be Done With the New H. R. T. & L. Co., Franchise, Passed by the Legislature and Congress in 1921?

A Report Thereon to the Directors, by a Special Committee of Four, consisting of L. T. Peck, A. L. Castle, H. S. Johnson and L. A. Thurston.

1. *Expiration of Present Franchise.* The present franchise expires in June, 1929, or in 7½ years, according to the claim of the Government, or June, 1930, or 8½ years, according to the claim of the Company.

New Franchise Passed by Legislature. A new franchise was passed by the local Legislature of 1921, which provided for an indefinite term, subject to amendment or repeal by the Legislature, *"with the approval of Congress."*

The form of this franchise was approved by the company.

Amendment by Congress. This franchise was approved by Congress with the elimination of the above words "with the approval of Congress."

The Effect of the Amendment is that the new franchise may be amended or repealed by the local Legislature without right of appeal to Congress by the Company and without compensation if revoked.

Company Must Act by February 24, 1922. The Company is allowed six months within which to accept or reject the new franchise. The six months expires February 24, 1922.

Question Before the Company.

The question before the Company is:—
"What shall be done with the new franchise?"

There are three alternative courses which may be followed, viz.:

First Alternative

Reject the new franchise and stand pat on the Company's legal rights under the existing franchise, making no additions or improvements, except such as are necessary from the Company's own standpoint, to enable it to make the most out of the business; such,

for example; as increasing the number of cars and power, so far as it may be profitable to do so, to care for the increased traffic; also to add such tracks as may conduce to the same purpose.

Second Alternative.

Reject the new franchise and seek a satisfactory franchise from a succeeding Legislature and Congress.

Third Alternative.

Accept the new franchise and proceed under it.

Analysis of the Three Alternatives.

The following is a statement of the arguments for and against each suggested alternative plan.

Arguments For and Against First Alternative, Viz.:

Before this proposition can be considered intelligently, it is necessary to know and consider the present status and financial condition of the Company and have an estimate of what the financial outcome will be if this course is followed.

The following is an outline of such status and outlook:

Financial Status and Outlook Under Present Franchise, If Same Is Not Extended.

This statement is based upon the assumption that it expires in 1930.

Present Debt of Company. The only debt of the Company is an open account of $135,000.00 owed to the bank, bearing interest at the rate of 6% per annum.

Present Issued Capital Stock of the Company. The issued capital stock of the Company amounts to $2,000,000, divided into 20,000 shares of a par value of $100 each.

If the Company is to liquidate at the end of the franchise, without loss to the stockholders, it must accumulate sufficient surplus, which, together with the sale value of its then remaining property, will pay off said debt of $135,000 and pay to its stockholders the said par value of their stock—$2,000,000; or a total sum of $2,135,000.

Can This Be Done?

The following is an analysis, and estimate of the probabilities upon this point:

Resources From Which to Pay Debt and Redeem Stock at Par.

The money for these purposes can come from but three sources, viz.:

1. Present Reserve Sinking Fund and interest thereon;
2. Surplus to be accumulated from profits during the remaining term of the franchise.
3. Sale value of the property of the Company at termination of the present franchise.

Estimate of Money Available From Foregoing Resources.

The following is an estimate of the amount available from the foregoing sources, viz.:

1. *Estimated Amount Available From Present Reserve Sinking Fund.*

Principal (now invested in Mainland bonds) approximately	$227,000
Compound interest thereon at 5% for 8½ years	116,367
Total	$343,367

The market price of the bonds in which this fund is invested is now approximately 12-15% below the price at which they were bought; but their market price is rapidly rising, and the probability is that they can soon be sold at cost, if so desired, and the proceeds invested in bonds returning 6% or 7%. If this is done it would increase this resource by some $50,000 odd.

2. *Estimated Surplus Profits During Remaining 8½ Years of Present Franchise.*

The gross receipts during the past 5 years have rapidly and steadily increased.

They are as follows:

Year.	Gross Receipts.	Increase Over Previous Year.
1917	$726,000	$57,000
1918	735,000	9,000
1919	780,000	45,000
1920	861,000	81,000
1921	960,000	99,000

The average net annual profits for the 5 years 1912-16, both inclusive, were $198,959.

The average net annual profits for the 5 years 1917-21, both inclusive, were $244,089.

An average annual increase of the second five-year period over the former of $45,130.

It is believed that the future gross revenue will continue to increase based on the steady growth of the city.

It is further believed that the average net annual profits will also continue to increase, for the reason that, while gross receipts are increasing, the price of material is decreasing and the rate of wages is at a standstill.

It is therefore deemed safe to estimate upon a continuance of the average surplus profits of the past 5 years, during the remaining years of the franchise, with the possibility, if not the probability, of there being a considerable excess.

On the 8½-year basis this would amount to	
$244,089 × 8½	$2,094,801
Less current annual dividends at 8% on $2,000,000 stock—$160,000 per annum for 8½ years	1,360,000
Balance from this source available for redemption of stock	$ 734,801

3. *Sale Value of the Property at Termination of Present Franchise.*

The original cost of the present tangible assets was over $2,750,000. It has been kept in first-class repair and replacements have been made wherever necessary.

The following schedule and estimate of value is made by Manager Stuart Johnson, who states that it is made on a conservative selling-out basis.

The Real Estate is estimated at present value plus a conservative estimated appreciation of approximately 7%.

The Rail and Wire Systems are estimated at a value at which the successor could not afford to let them be removed.

Condensed Schedule of Property and Value at End of Present Franchise.

Land and Dwellings		$ 500,000
Tracks, Poles and lines	$620,000	
Cars and Equipment	309,500	929,500
Power Plant, Car Houses, Shops and Equipment	$150,000	
Material and Supplies	50,000	200,000
Total Sale Value		$1,629,500

Summary of Estimated Resources From Which to Pay Debt and Redeem Stock at Termination of Franchise—8½ Year Basis.

1. Reserve Fund and compound interest at 5%	$ 343,367
2. Surplus profits	734,801
3. Sale value of property at end of franchise	1,629,500
Total	$2,691,317
Amount required to pay debt and redeem stock	2,135,000
Excess over amount required	$ 556,317

= $27.80 per share.

Resources on a 7½ Year Basis.

If the franchise has only 7½ years to run the foregoing estimate would be revised as follows:

Reserve fund and compound interest at 5%	$ 327,367
2. Surplus profits	650,716
3. Sale value of property at end of franchise	1,629,583
Total	$2,607,583
Amount required to pay debt and redeem stock	2,135,000
Excess over amount required	$ 472,583

= $23.63 per share.

Summary of Estimated Resources From Which Debt Must Be Paid and the Stock Redeemed.

From the foregoing there seems to be no doubt that the resources from which the debt must be paid and stock redeemed at par are ample for the purpose, with the possibility of a surplus at 20% to 30%.

It is therefore legally possible for the stockholders to reject the new franchise, make no further additions to or improvements in the plant, except such as are for their own benefit, receive dividends at the rate of eight per cent per annum and come out whole at the termination of the franchise.

Reasons Against First Alternative.

Reasons against alternative number 1, are:

1. *The Public Necessity For Immediate Extension and Expansion* of the system is so great that no course inconsistent therewith is morally justifiable if

any other plan can be adopted consistent with the financial safety of the stockholders.

2. The unpopularity of this course would make it very unpleasant for directors and stockholders.

Second Alternative.

Reject the New Franchise and Seek a Satisfactory Franchise from a Succeeding Legislature and Congress.

Arguments For and Against the Second Alternative.

Points in Favor of the Second Alternative.

1. The New Franchise is unfair to the Company.

(1) *Legislature Can Repeal Franchise.* It gives the local Legislature complete power to amend or cancel the franchise, without appeal on the part of the Company, without compensation if revoked.

Other Utility Companies. No other Utility Company in Honolulu is subject to these provisions unless the act of the Legislature is approved by Congress.

It is unfair to thus discriminate against the R. T. Co.

(2) *The Franchise Provides Unsafe Security.*— The New Franchise provides such unsafe security on which to issue stock or bonds with which to finance extensions and improvements that they cannot be sold, and the present invested capital is not safeguarded.

The New Franchise is in the nature of a lease which can be terminated at the will of the lessor, without the consent of the lessee.

In case of the termination of the franchise, the Company will be left with a plant of high value as a going concern; but largely of junk value only, if it has to be removed from the streets.

It is useless to accept the franchise, unless the Company can secure money with which to make the necessary extensions and improvement.

If the Company accepts the franchise without the assurance that it can finance necessary extensions and improvements it will assume an obligation which may be ruinous to its stockholders, involving the loss of all, or a large part of their present property, which is now practically free from debt.

(3) *Congressional Amendment Without Knowledge or Consent of Company.* The amendment deleting the provision requiring the approval of Congress to an act by the Hawaiian Legislature to repeal the franchise, was made without the knowledge or consent of the Company. The amendment was not made at the request of any Hawaiian authority.

The Hawaiian Legislature, the Territorial Utilities Commission and the Honolulu Board of Supervisors had all approved of the clause providing that the Legislature could not amend or repeal the franchise, except upon the approval of Congress.

If the franchise in the form passed by Congress had been presented when the Legislature was considering the new franchise, the Company would have refused to approve it and the new franchise would not have been passed by the Legislature.

The appeal to Congress provided a vital safeguard against arbitrary action against the Company by the Legislature.

Why should the Company now waive this safeguard and accept an indefinite franchise, which was not asked for by any local authority and which involves the possible loss or radical depreciation in value of its securities worth approximately $3,000,000; all of which can be redeemed at not less than par if the new franchise is rejected and operations continued under the old franchise until its expiration. There will be four sessions of the Legislature before the expiration of the present franchise, any one of which can be asked to safeguard the Company in a definite contract by amendment of the existing franchise.

Points Against the Second Alternative.

1. *Rejection of the Franchise Will Cause a Long and Indefinite Delay in Making Extensions and Improvements.*

The next Legislature does not meet until the Spring of 1923. The first regular session of Congress thereafter does not meet until December, 1923.

There is no likelihood that the present Congress which passed the new franchise will reconsider it; and, at best, any action by Congress will be difficult and unlikely before late in 1923.

If the amendment desired were ultimately passed, in all probability the earliest construction work that could be undertaken by the Company under it would be well along in 1924.

2. *The Necessity for Extensions and Improvements* are so great that delay caused by the Company rejecting the new franchise, whether justified or not, may excite such resentment on the part of the public as to make it exceedingly doubtful whether any further amendment to the franchise would be granted by the Legislature.

3. *Possibility of Selling R. T. Stocks and Bonds.* It cannot be known beforehand, without steps being taken to ascertain the facts, whether R. T. stocks and bonds can be sold under the new franchise.

No such attempt has yet been made, and the time left in which to make the attempt is too short in which to ascertain with any certainty, whether such attempt would meet with success.

Even if the attempt were made prior to acceptance of the franchise, it would largely be a "straw vote" and not decisive as would be the case if the franchise had actually been accepted and the call for stock subscriptions were actual and not tentative.

If the franchise is accepted, and a bona fide attempt is made to place stock and fails, the foundation will have been then laid for a further appeal to the present session of Congress with a presentation of the facts. If that fails, resort can then be made to the next Legislature and the following Congress, with a demonstration that the proposed new franchise is unworkable, in which case there would be a fair chance for securing amendments necessary to finance the Company.

4. *Company's Consent to Form of Franchise Permitting Repeal with Approval of Congress Without Purchase Clause, Weakens Its Objection to the Amended Franchise.* The Company consented to the clause permitting repeal without purchase, provided the Legislature and Congress both approved.

The only change is that the Legislature alone is given the power to cancel. The Company having conceded this principle, the mere fact that the provision for the approval of Congress has been eliminated does not carry the weight that it would have done if such consent had not been given.

The Third Alternative.

Accept the New Franchise and Proceed Under It.

Reasons For and Against the Third Alternative.

The reasons in favor of the third alternative are:

1. *It clears the way* for proceeding immediately with the required extensions and improvements, if they can be financed.

2. *No Practical Danger in Power of Repeal.* Although the new franchise gives theoretical power of repeal of the franchise, the practical danger of its exercise is remote.

During the twenty-two years of the life of the Company, repeated attacks upon the Company have been made by successive public officials which have been carried to the Legislature and the Courts; but in every instance the Company has been sustained by both the Legislature and the Courts; and in no in-

stance have either Legislature or the courts shown themselves inimical to or unfair to the Company.

If the Company proceeds in a bona fide way to make necessary extensions and improvements and to give a high class service, there is no reason to believe that hostile action will be taken by the local Legislature.

If a hostile or unfair attitude is assumed by the Legislature there is nothing to prevent the Company appealing to Congress for relief.

If the third alternative is determined upon the franchise should be accepted, and steps then immediately taken to ascertain whether new shares of the Company can be placed with which to make extensions and improvements. This should be done in the same manner as outlined above under discussion of the second alternative.

Recommendation by Directors to the Stockholders.

At a meeting of the directors of the Company held in Honolulu Friday, February 3, 1922, it was unanimously voted that:

"The directors of the Company having carefully considered the foregoing report recommend to the stockholders that the third alternative as above outlined be adopted namely, that the franchise be accepted; that upon the acceptance of the franchise an earnest effort be then immediately made to finance the necessary extensions and improvements and proceed with them; and that if the attempt to finance fails, the facts should then be laid before Congress

and the Legislature, and such amendment to the franchise secured as will enable the Company to finance itself.

"The directors believe that in such event the Legislature will give the Company a square deal and enact amendments which will enable the Company to make the extensions and improvements necessary for the public welfare.

"The directors also urge the presence of each and every stockholder at the special meeting to consider action on the proposed franchise which is to be held at the Chamber of Commerce rooms in Honolulu, Thursday, February 16, at 2 P. M. In order to accept the new franchise there must be an affirmative vote of two-thirds of the issued and outstanding capital stock of the Company. At present there are 20,000 shares issued and outstanding, so that in order to accept the franchise there must be an affirmative vote of not less than 13,334 shares. If your stock is not represented at the meeting it is in effect a negative vote. If you can not be present in person, kindly send a proxy."

I hereby certify that the foregoing is a full and correct copy of the report of the directors of the Honolulu Rapid Transit and Land Company, and of the Resolution adopted by said directors.

Alfred L. Castle,
Secretary, H. R. T. & L. Co.

February 3, 1922.

Appendix E

Honolulu, T.H., Feb. 23rd 1921.

To the Honorable

The President and Members of the
Senate of the Territory of Hawaii.

Gentlemen: In compliance with Senate Concurrent Resolution No. 23 of the Regular Session of 1919 requesting the Public Utilities Commission of the Territory of Hawaii to investigate and fully report on the question of the terms that should be incorporated in any franchise hereafter to be granted, or the terms of any amendments hereafter made to any existing franchise for any street railway company or companies in the City and County of Honolulu, said report to be made to the Senate and House of Representatives of the Territory of Hawaii of the Legislative Session of 1921, and in compliance with the understanding between the Committee on Judiciary of the Senate of the Special Session of 1920 and the Commission set forth in the report of said Committee, we respectfully report as follows:

We are of the opinion that it would be inadvisable for the Legislature to enact legislation on this question other than in the form of a complete bill providing for such franchise, as the different portions of a bill of this nature are so interrelated that all sections must be considered together in order to prevent conflicts between sections and conflicts between the theory underlying the amendments and the theory underlying the original bill. In consequence we feel

that a mere enumeration of certain specific terms that we believe should be incorporated in any franchise would be of no value whatever to your Honorable Bodies unless the remaining terms of such franchise were properly co-ordinated to the terms deemed advisable. We therefore submit to you a complete bill and not mere disjointed paragraphs to be inserted in some other bill.

We believe that it is the intent and understanding of the members of your Honorable Bodies that any new street railway franchise for the City and County of Honolulu granted should be granted to the Honolulu Rapid Transit and Land Company, the present holder of a franchise to operate a street railroad in the District of Honolulu, and that such new franchise should be substituted for the existing franchise held by said Company: that the taking effect of such new franchise should operate as an extinguishment of any claims or rights the said Company may have under its present franchise, and, on the other hand an extinguishment of any claims the Territory of Hawaii may have under or on account of the existing franchise. In consequence, therefore, we have prepared our bill in the form of a new franchise for the Honolulu Rapid Transit and Land Company.

We have carefully considered Senate Bill No. 28 of the Special Session of 1920, a proposed substitute bill for said Senate Bill No. 28 submitted to the Commission by the Company and a proposed substitute bill submitted to the Commission by the City and County Attorney's office and have held many and

lengthy public hearings on all of said proposed bills. The Commission has not considered Senate Bill No. 194 of the Legislative Session of 1919 for the reason that the Company specifically withdrew its advocacy and support of such bill on the grounds that at the present time such bill was not satisfactory and undesirable, in which opinion we concur. We, therefore deemed it inadvisable to spend time or funds in further consideration of said Senate Bill No. 194.

As a result of the Commission's investigation and deliberation, the Commission finds the only practical way of presenting its views to your Honorable Bodies to be the presentation of a complete bill providing for a franchise for said Company, and we transmit herewith for introduction in the Senate by the Committee on Judiciary of the Senate a bill entitled:

"An Act

To amend an act entitled 'An Act to authorize and provide for the construction, maintenance and operation of a street railway or railways in the district of Honolulu, Island of Oahu,' enacted by the Legislature of the Republic of Hawaii, July seventh, one thousand eight hundred ninety-eight, and granting a franchise to the Honolulu Rapid Transit and Land Company to operate a street railway in the City and County of Honolulu, providing for the operation of the same and providing for the purchase of the same by the City and County of Honolulu,"

providing for such franchise.

The bill as proposed by the Commission differs radically from Senate Bill No. 28 and the proposed substitute bill furnished by the Company to the Com-

mission, and that contended for by the City and County Attorney.

Among the more important provisions of the bill we call your attention to the following:

I. Term of Franchise–Indeterminate (Section 2 of the Bill). It is obvious that rates which will enable a street railway system to earn a fair return upon its plant and set aside a sinking fund sufficient to reimburse the stockholders the cost of such plant within a limited period of years will be much higher than if the said railway is not under such obligation and is given a term which depends upon it satisfactorily performing its duties. The interests of the public are protected by placing the utility under the control of the Public Utilities Commission, giving to the Legislature with the approval of Congress power to amend, alter, or repeal the franchise.

II. Extent of Franchise–City and County of Honolulu (Section 2 of the Bill). We believe that the franchise should provide for the possibility of future extensions outside of the District of Honolulu as the necessity of the future may require. It is impossible to foresee the future growth or transportation requirements of the City and County of Honolulu, and it should not be necessary to obtain an amendment of the franchise whenever an extension outside of the District of Honolulu is found necessary. The interests of the Company and of the public will be adequately protected against unreasonable extensions by the provisions of the Bill relating to extensions (Section 16), and the proviso preventing competition with an existing railway when such is adequately serv-

ing the district, protects other utilities and also prevents wasteful duplication of capital and unnecessary competition.

III. Paving Obligations (Section 6). Under this bill the Company is obligated to lay initial paving and to maintain and keep in repair all paving between its outside rails whether laid by it or not.

Under the present franchise the Company is obligated to pay for all paving or repaving of its portion of the streets and in addition keep the same in repair but make no other payment to the City and County.

The Company is not the sole user of the pavement of the streets between its tracks. All that should be justly required of the company is that it make good the additional expense caused by the existence of its railway on the streets.

The Commission in endeavoring to ascertain how much this increased expense amounted to called upon the City and County for testimony on such question. The City and County's experts were unable to give either figures on such question or any basis of calculation from which figures could be obtained.

We believe that a certain amount of increased expense is caused by the existence of the street car tracks upon the streets due, 1st, to slightly increased expense of laying paving in sections rather than over an entire street, and 2nd, to deterioration in the street caused by water seeping under the street pavement, and by vibration of the street car tracks. We do not believe that this expense amounts to enough to justify

the imposing upon the Company of the obligation to perpetually pave, repave and maintain that portion of the street between one foot outside of its outside rails.

We likewise feel that the contention of the City and County that it should be compensated for the obstruction of its streets and the increased density of traffic on its streets has no merit for the reason that a street car service is a public convenience and necessity and the disadvantage caused to the public is more than compensated by the convenience of a street railroad.

We think that substantial justice will be done in the premises by limiting the Company's obligation to initial paving and thereafter maintaining and compensating the City and County for any loss caused to it and for reasonable rental for the use of its streets by the payment by the Company to the City and County of 4 per cent (4%) of its gross receipts as provided for in Section 17.

Under this Section we have provided for initial regulation as to location, relocation of tracks, paving and maintenance thereof by the Board of Supervisors with a right in the Board of Supervisors to make the necessary changes if the Company fails or refuses so to do with an appeal to the Commission, the Commission's decision being final. This limitation of appeal is included for the reason that the determination of such questions should be speedy and the opportunity for long delays due to a series of appeals eliminated.

IV. *Initial Valuation* (Section 9). The Bill provides for a valuation of the physical property of the Company by the Commission thirty days after the acceptance of this franchise by the Company, and that the capital stock shall be made to correspond to such valuation, the expense of such valuation to be borne equally by the City and County and the Company.

V. Additional Stock and Bonds, Notes and Indebtedness (Sections 10, 11 and 12). Additional stock and bonds, notes and indebtedness may with the approval of the Commission be issued, but stock can only be issued from the amount of funds actually received and expended by the Company. These sections prevent the capitalization of any expenditures out of the income and also the redemption of bonds with stocks of a greater amount than the actual cash received. In no case can the capital stock of the company be issued for a greater amount than the cash actually expended by the Company.

VI. Additions, Extensions, Increases, Betterments, and Improvements (Section 16). Under this Section additions, extensions, increases, betterments and improvements can only be made after the approval of the Commission or when directed by the Commission after an investigation and determination that the earnings of the Company when maintaining its entire plant including such additions, extensions, increases, betterments and improvements will be able to meet the reasonable cost of operation plus a fair return on the total plant of the Company. The Section also pro-

vides for a discontinuance with the approval of the Commission of such extensions as may turn out to be a burden on the entire system.

VII. Annual Payment to the City and County (Section 17). This Section provides for a payment of 4 per cent (4%) of the gross receipts to the City and County as distinguished from the ordinary payment of 2 1/2 per cent (2 1/2%) required of other utilities. This increased percentage we consider fair in view of the provision with regard to paving and also in view of the much greater use of the streets made by this Company as compared to other utilities which are paying 2 1/2 per cent (2 1/2%). This Section together with the paving section in our opinion does full and complete justice to the City and County.

VIII. Purchase by the City and County (Section 24). The City and County is authorized to purchase the railway system by paying the amount of outstanding stock and assuming all outstanding liability of the Company. We have added to the provision suggested by the City and County a requirement that such purchase can only be made after the same had been authorized by the registered voters of the City and County of Honolulu at an election held under such terms and conditions as now or may hereafter be required for the issuance of bonds. As the purchase of this system would require the issuance of bonds we feel that the taxpayers should pass upon this matter in the same manner as in the case of any other bond issue made by the City and County. In addition

we have specified the disposition of revenues received from the operation of the railway. We think that the latter is necessary.

IX. Control by the Commission (Sections 18 and 19). These two sections provide for complete control by the Commission of rates, regulations, conditions of employment, wages of employees, systems of accounting and in general complete control over the Company in its dealings with the public and its employees. In our opinion this is far preferable to an attempt to enumerate in detail the provisions as to fares, wages, pension and other provisions relating to the operation of the railroad.

Section 19 provides for an appeal from every order, direction and decision of the Commission which can be taken advantage of by any party in interest.

X. Fares. As pointed out in the previous paragraph the question of fares is handled under the general control by the Commission. In our opinion it is impossible to foresee what fare will be just and reasonable as the experience of street railways throughout the country during the past few years has amply demonstrated. Any fixed fare or any limitation with regard to fare may in the future prove too high or too low or to operate unjustly and there would be no possible remedy except by amendment to the franchise.

XI. Penalties (Sections 20 and 23). In addition to the provision relating to forfeiture of the franchise by the Company for failing or refusing to carry out

the provisions of its franchise or lawful orders issued thereunder this Bill also provides for the individual liability of officers and employees of the Company who are responsible for such violations.

We have not attempted to discuss all of the provisions of the franchise as we are of the opinion that the other provisions of the bill speak for themselves.

Respectfully submitted,

Public Utilities Commission of
the Territory of Hawaii,

William T. Carden, Chairman.
I. M. Stainback, Commissioner.
A. J. Gignoux, Commissioner.